

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BRANDON HARRIS,

Plaintiff,

v.

JFC INTERNATIONAL INC., et al.,

Defendants.

CASE NO. 21-CV-01536-LK

ORDER DENYING STIPULATED
MOTION

This matter comes before the Court on the parties’ Stipulated Motion to Allow Taking of Video Recorded Trial Testimony Past the Discovery Completion Deadline. Dkt. No. 32. As the title of their motion suggests, the parties wish to conduct video recorded perpetuation depositions after the May 19, 2023 discovery cutoff. *Id.* at 1. They contend that presentation of this recorded testimony at trial will save time and cut costs. *Id.* The parties further suggest that such depositions may be unnecessary if mediation proves successful. *Id.* However, because mediation is just now being scheduled, they request permission “to take and preserve video trial testimony until at least September 6, 2023.” *Id.* at 2.

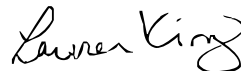
1 The parties' request implicates Federal Rules of Civil Procedure 16 and 32. And it fails
2 under both. "Perpetuation depositions—also known as *de bene esse* depositions—preserve
3 testimony for use at trial where the witness may be unavailable to attend trial." *Holen v. Jozic*, No.
4 C17-1147-JLR, 2018 WL 4518699, at *1 (W.D. Wash. Sept. 20, 2018). The parties must show
5 good cause under Rule 16(b)(4) to extend the May 19, 2023 discovery deadline if they wish to
6 conduct perpetuation depositions beyond that date. They have not done so. The good cause
7 standard is met when the current deadlines "cannot reasonably be met despite the diligence of the
8 party seeking the extension." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir.
9 1992) (cleaned up). Here, the parties do not contend that the witnesses at issue cannot be deposed
10 before May 19th despite their diligence. They instead argue that a schedule modification will allow
11 them to avoid the costs associated with video depositions should mediation prove successful. That
12 is not the test. The Court therefore cannot find the requisite good cause to modify its pretrial
13 schedule.

14 Nor would the perpetuation depositions be permitted at trial based on the scant information
15 the parties provide in their motion. A party may use a deposition at trial "for any purpose" if the
16 Court finds that the witness is dead; the witness is "more than 100 miles from the place of hearing
17 or trial or is outside the United States"; the witness is unable to testify at trial "because of age,
18 illness, infirmity, or imprisonment"; the offering party could not procure the witness's attendance
19 by subpoena; or "exceptional circumstances make it desirable—in the interest of justice and with
20 due regard to the importance of live testimony in open court—to permit the deposition to be used."
21 Fed. R. Civ. P. 32(a)(4). The parties make no effort to identify the witnesses who will testify
22 through perpetuation depositions or explain why the use of that testimony at trial will meet one of
23 Rule 32(a)(4)'s predicate circumstances. To the extent they suggest that their desire to save time
24 and money qualifies as "exceptional circumstances," the Court does not agree. The "exceptional

1 circumstances” requirement is a “stringent standard” that applies when live testimony from the
2 deponent is impossible or highly impracticable. *Waller v. Mann*, No. C17-1626-RSL, 2021 WL
3 2531008, at *2 (W.D. Wash. June 21, 2021) (collecting cases and explaining why retired expert
4 was not “unavailable” to testify); *compare Holen*, 2018 WL 4518699, at *1–2 (allowing
5 perpetuation depositions of five medical experts who were located outside of Seattle given the
6 “significant expense” associated with their hourly rate and travel). Moreover, to the extent any
7 witnesses will have difficulty appearing in person at trial, Federal Rule of Civil Procedure 43(a)
8 permits testimony over a platform such as Zoom “[f]or good cause in compelling circumstances
9 and with appropriate safeguards.”

10 The parties’ stipulated motion is DENIED without prejudice to renew should they wish to
11 supply the requisite good cause for a schedule modification and explain why the perpetuation
12 depositions will satisfy Rule 32(a)(4).

13 Dated this 4th day of May, 2023.

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16 Lauren King
17 United States District Judge
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